

Radical Libertarianism: Applying Libertarian Principles to Dealing with the Unjust Government, Part I

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Late one night in Washington, D.C. a mugger wearing a ski mask jumped into the path of a well-dressed man and stuck a gun in his ribs.

"Give me your money!" he demanded.

Indignant, the affluent man replied, "You can't do this. I'm a United States Congressman!"

"In that case," replied the robber, "give me my money!"¹

1. Introduction

The present paper attempts to trace out the implications of the libertarian philosophy for the proper relationship between an inhabitant of a country, and its unjust government.

Part I of this paper includes section 2, in which the stage is set for answering this challenging question, section 3, in which the essence of the state is discussed, section 4, in which libertarian punishment theory is introduced and the beginning of section 5, in which the concept of the libertarian Nuremberg trial is explored, and in 5a. the assumption that all citizens are guilty of the crimes of the unjust state is rejected.

In Part II of this paper, we begin with section 5b. which considers the possibility that all and only minions of the unjust state are guilty for its crimes, in a continuation of our libertarian Nuremberg trial analysis, and 5c. introduces libertarian ruling class theory. Section 6 traces out the proper relations between the subjects and the unjust government, section 7 asks if it is ever legitimate to disrupt such an institution, and we conclude in section 8.

¹ The present author wishes to express a debt of gratitude to N. Joseph Potts for editing this paper. All remaining errors are the author's, alone. The present paper is an academic study of the implications of the libertarian philosophy. It makes no threats against anyone. As the title implies, there is nothing in the present paper that is inconsistent with the existence of a just government. This paper is written in memory of Ragnar Danneskjold. May he never be forgotten.

2. Libertarian Implications

What is the proper relationship between an inhabitant of a country, and its unjust government?² This is an interesting and important question for the libertarian or objectivist philosopher, one to which not much attention has been paid in the literature.

In what is to follow I do not *advocate* that anyone do anything; certainly not anything illegal under the laws of the country concerned. I confine myself merely to legal speculation; I attempt only to explore the logical implications of libertarian theory in this area. Nevertheless, as per the Star Trek motto, it is my intention that this quest shall enable us to "go boldly where no man has gone before."

Libertarianism is based upon the building blocks of self-ownership, private property rights, the non-aggression axiom, and Lockean homesteading theory.³ In this philosophy, it is improper for governments, private criminals, or anyone else, to initiate violence against innocent persons or their property. All interaction is to take place on a voluntary basis.

That is to say, the individual can do whatever he wants to do. In the libertarian society, he has complete freedom. Except; he cannot violate the equal rights of all others, by attacking their bodies (murder, rape, assault and battery), or their property (theft, fraud, counterfeiting), or even threaten such activities⁴. To put this in another way, there would be no uninvited border crossings between one person and his property and another. Invited ones, in contrast, e.g., voluntary sadomasochistic acts, would be legitimate. Another way to put this is that in addition to social or sexual acts between consenting adults being lawful, this would apply, also, to "capitalist acts between consenting adults"⁵. This does not mean that anything devised by people on a voluntary basis would be moral; merely that there would be no warrant under the libertarian legal code to initiate violence against them, for example, by incarcerating them. The only legitimate titles to property would stem from creation of them by one's own hands, trade, gifts, gambling, or any other voluntary mutually agreeable way of transferring

² As examples, think in terms of Nazi Germany, the U.S.S.R., Cuba, North Korea, etc. There are other states to which the appellation "unjust government" might apply, but for safety's sake I do not wish to discuss any I may ever live in, or even visit.

³ For more on this see Hoppe, Hans Hermann, *The Economics and Ethics of Private Property. Studies in Political Economy and Philosophy* (Boston: Kluwer Academic Publishers, 1993).

⁴ The fatwa issued against author Salman Rushdie for writing a book found insulting by certain theocrats would be illegal in a free society. Anyone who offered support for this dicta, too, would be found guilty under libertarian law.

⁵ Nozick, Robert, *Anarchy, State, and Utopia*, New York: Basic Books Inc., 1974, p. 163).

property.

This may sound unobjectionable to all men of good will, but if followed, fully, a large part of what now passes for legitimate law would have to be repealed. For example, discrimination of whatever kind or variety would be allowed, since refusing to deal with people on the basis of their sex, or race or national origin does not constitute a physical attack on them, the only thing proscribed by libertarian law. Thus, the Civil Rights Act of 1964 would have to be eliminated. Similarly, virtually all of labor law would fall by the wayside, as most of it is predicated upon forcing the employer to deal fairly with unionized workers. But suppose he does not wish to deal with them at all? That is part and parcel of his right of free association, under the libertarian legal code. There would of course be no victimless crimes concerning sex, drugs, pornography, prostitution, since by definition, if they are voluntary, they involve no uninvited border crossing. Nor would there be any economic crimes, such as disobeying rent controls, maximum hours, minimum wages, zoning, tariffs, for such laws are themselves violations of the right to buy and sell at any mutually agreeable terms.

I do not intend to fully rehearse the anarchy vs. limited government libertarian controversy, which debates whether there *could* be a legitimate state apparatus. For present purposes, I shall assume, with the minarchist libertarians, simply for the sake of argument, that this concept is not an internal self-contradiction; that is, that there could be such a thing as a government that does not violate libertarian rights. However, I shall also assume that there are at least *some* states that *are* illegitimate⁶. The purpose of the present paper is to discuss

⁶ Could it be claimed that the present paper is incompatible with Rand's notion of government? Nothing could be further from the truth. This is a serious misreading of not only my paper but also of Atlas Shrugged. It cannot be denied that for Rand, governments are not criminal gangs per se (that is, when they limit themselves to their proper role of protecting rights via armies, police and courts). However, when governments exceed their proper authority, when their scope goes beyond the protection of man's rights, then they most certainly *are* akin to criminal gangs; this is a direct implication of her political philosophy. How else can we account for the fact that Ragnar, a hero of her novel if ever there was one, utilized force against the government depicted in Atlas, which *did* (vastly) exceed its proper authority? To claim that I am in opposition to Rand on this point, e.g., that I am herein advocating anarcho-capitalism, is to confuse how Ragnar treated excessive government with how he would have dealt with a properly limited state. That is, he would never have used violence against minarchism. That he *did* use force against the "People's State of America" definitively shows she thought this was an improper government. The present paper may thus be interpreted as an attempt to unearth the logical implications of Ragnar's justified actions. Please do not interpret this footnote as evidence that I agree with Miss Rand on all issues; to the contrary, in Block, Walter. 2002. "The Libertarian Minimal State?" A critique of the views of Nozick, Levin and Rand, *Journal of Ayn Rand Studies*, Vol. 4, No. 1, pp. 141-160, I do take issue with her views on anarchism.

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how the citizen of one of the *latter* may properly act, in a manner compatible with libertarianism.

In any case, similarities between these perspectives are more important than their differences, regarding our present analysis. For both variants of libertarian thought agree that when the government exceeds its proper role, the presumption is that it is illegitimate. For the anarchist, of course, all states necessarily violate this stricture. However, even for the limited government libertarian a state may usurp power not properly belonging to it, specifically, if it organizes manages and runs anything more than courts, armies and police. In this case, both varieties of libertarian, anarchist and minarchist, would unite in declaring such an entity improper.

But this does not at all imply that *every* act undertaken by an agent of an illegitimate state is improper. Suppose a cop employed by an illicit government stops a murderer from killing an innocent victim. That is, a Nazi policeman saves this particular person from death. Now, while it is indeed true that the Nazis themselves are guilty of mass murder, and that this particular representative of that regime may well be implicated in such injustice in other contexts (to be discussed below), it cannot be denied that in the present situation, the one where our Nazi cop is about to foil a different non Nazi murderer, his actions are entirely appropriate from a libertarian point of view.

I intend to examine a plethora of government activities and programs, and to determine what the libertarian point of view on each should be. Private property and the non-aggression axiom are necessary guidelines for our analysis. Also helpful will be what has been called "taxi cab" theory⁷.

Suppose you are in the southern part of a city, and want to go to the western sector. You get in a taxi, and say, "Please take me to such and such an address, in the western part of the city." The driver replies, "I only go to the northern and eastern areas. Sorry, I can't take you to the west." What do you do? Do you choose the northern part of the city, on the ground that, if it is not exactly where you want to go, at least it is closer to the west than your other option, the east? Not a bit of it. Instead, you get out of that cab, bid the driver a curt adieu, and take another one to the west. The point is, as a libertarian, you do *not* compromise with libertarianism. If you do, you are no longer a member of this particular club.

There are many political economic controversies that, seemingly, offer us *only* a choice between two options, neither of which is compatible with libertarianism. The key, here, is to keep our eye on the ball; *not* to be deflected

⁷ I owe this insight to Michael Edelstein and Nando Pelusi. For a further treatment of this concept, see Whitehead, Roy and Walter Block, "Direct Payment of State Scholarship Funds to Church-Related Colleges Offends the Constitution and Title VI," *Brigham Young University Journal of Public Law*, Vol. 14, No. 2, 2000, pp. 191-207.

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from the one true political philosophy.

Let us consider a few of them.

Should public school children be forced to wear uniforms? The arguments in favor of such a policy are reasonable. Such a policy promotes esprit de corps amongst children. There appears to be a correlation between the wearing of such uniforms and a reduction in truancy and fighting; as well, marks on exams rise and graduation rates increase. On the other hand, self-styled civil libertarians object to forcing youngsters to adopt school uniforms. There are claims that this is a violation of free speech. So which is it? Do libertarians favor this policy, or not?

The answer, of course, is that we reject both horns of this dilemma: in the free society, there would be no such thing as a public school, there would be only private ones. And the student uniform policies of private institutions would be no more a public policy issue than are the table-cloth colors of restaurants at present⁸. Admittedly, this sounds like a "cop out." We are, after all, refusing to enter into the lists on this important debate of the day. But to do so would be to go "north," or "east," when "west" is the only proper direction for us to travel in. Libertarians must not be seduced from their philosophy by the siren song of relevance. Both public school uniforms, and public school non-uniforms policy are contrary to freedom. *Both* must be rejected.

A similar analysis applies to whether K-12 public schools should embrace phonetics or whole language teaching methods, the "new" math or the old. With no public schools, the question does not arise, and private educational enterprises can and should make these decisions for themselves, and then sink or swim on the basis of how their customers evaluate these choices. Ditto for sex education, condom distribution, and the burning question of whether 7 year olds should be exposed to lesbian feminist texts such as *Heather Has Two Mommies*.

This perspective also sheds light on the issue of school vouchers vs. the status quo manner of financing public schooling: taxes and neighborhood schools.

We want to go west (full private schooling). There is no sense debating whether vouchers or the present system is north or east, closer to the full and complete separation of education and state. Milton Friedman, an advocate of vouchers⁹, notes that at present the government both finances and manages public schools. His plan would eliminate the latter while retaining the former¹⁰. But the Nazis

⁸ In countries with government provision of restaurants, this might indeed be an equally vexing problem in need of solution. Libertarians would absent themselves from this debate, too, and counsel immediate privatization of all restaurants.

⁹ He also calls himself a libertarian, a claim that cannot be sustained based on the analysis of this paper.

¹⁰ <http://www.cato.org/pubs/pas/pa-269.html>;
<http://www.salon.com/news/feature/2000/03/27/vouchers/>;
<http://pw1.netcom.com/~garretc/politics/friedman.html>;

both financed and managed their concentration camps. Would it be libertarian to advocate their continued financing by the Nazi government, while giving over actual operation to private hands? Hardly.

Should there be academic tenure in public universities? Again, each side has something to be said for it. On the one hand, tenure allows academics free rein to express their beliefs. Out of this process, it is alleged, will come greater insights than if they have to look over their shoulders, in fear of their jobs, were they to express an unpopular opinion. On the other hand, some professors use tenure as an early retirement guarantee. Secure in their jobs, they become so much intellectual dead weight, making no further intellectual contributions, and slackening off on everything else (e.g., teaching) as well.

The libertarian answer, here, is easy to see. Privatize all universities, and allow them to determine these essentially labor management decisions for themselves. Perhaps the market survival test will point in the direction of one or the other of these options; perhaps both will survive. In any case, the question does not even arise in the absence of public institutions of higher learning. And, as for the private colleges, they should be free to choose either of these options¹¹.

This steely determination *not* to see both sides of such debates will be of help in revolving numerous other public policy issues. Should this highway be widened or straightened? Should a bridge or tunnel be built here or there? The answer is to privatize the industry of road building and management, and allow private owners to make all such decisions, in conjunction with the owners of private property.¹² Should the government install air-conditioned subway trains,

<http://www.ncpa.org/pi/edu/july98c.html>

¹¹ For more on this, see McGee, Robert W. and Walter Block, "Academic Tenure: A Law and Economics Analysis," *Harvard Journal of Law and Public Policy*, Vol. 14, No. 2, Spring 1991, pp. 545-563.

¹² For the case in favor of private roads, see Beito, David T., "From Privies to Boulevards: The Private Supply of Infrastructure in the United States during the Nineteenth Century," in Jerry Jenkins and David E. Sisk, eds., *Development by Consent: The Voluntary Supply of Public Goods and Services* (San Francisco, 1993): 23-48; Beito, David T. and Linda Royster Beito, "Rival Road Builders: Private Toll Roads in Nevada, 1852-1880," *Nevada Historical Society Quarterly* 41 (Summer 1998), 71-91; Beito, David T. "Voluntary Association and the Life of the City," *Humane Studies Review*, Fall 1988; Beito, David T. "Owning the Commanding Heights," *Essays in Public Works History*, vol. 16, 1989; Block, Walter, "Free Market Transportation: Denationalizing the Roads," *Journal of Libertarian Studies: An Interdisciplinary Review*, Vol. III, No. 2, Summer 1979, pp. 209-238; Block, Walter, "Congestion and Road Pricing," *The Journal of Libertarian Studies: An Interdisciplinary Review*, Vol. IV, No. 3, Fall 1980, pp. 299-330; Block, Walter, "Public Goods and Externalities: The Case of Roads," *The Journal of Libertarian Studies: An Interdisciplinary Review*, Vol. VII, No. 1, Spring 1983, pp. 1-34; Block, Walter, "Theories of Highway Safety," *Transportation Research Record*, #912, 1983, pp. 7-10;

Block, Walter "Road Socialism," *International Journal of Value-Based Management*, 1996, Vol. 9, pp. 195-207; Block, Walter and Block, Matthew, "Roads, Bridges, Sunlight and Private Property Rights," *Journal des Economistes et des Etudes Humaines*, Vol. VII, No. 2/3, June-September 1996, pp. 351-362; Block, Walter, "Roads, Bridges, Sunlight and Private Property: Reply to Gordon Tullock," *Journal des Economistes et des Etudes Humaines*, Vol. 8, No. 2/3, June-September 1998, pp. 315-326; Foldvary, Fred, *Public Goods and Private Communities: The Market Provision of Social Services* (Edward Elgar, 1994); Cadin, Michelle, and Block, Walter, (1997), "Privatize the Public Highway System," *The Freeman*, February, Vol. 47, No. 2., pp. 96-97; Cobin, John, M. (1999), Market Provisions of Highways: Lessons from Costanera Norte. Planning and Markets, Volume 2, Number 1; De Palma, Andre and Robin Lindsey, "Private toll roads: Competition under various ownership regimes," *The Annals of Regional Science*, 2000, Vol. 34, pp. 13-35; De Palma, Andre and Robin Lindsey, "A Model of Curb Rights In Private Urban Transit Markets," *Canadian Transportation Research Forum*, Proceedings of the 36th Annual Conference, 2001, pp. 581-596; Klein, Dan, "The Voluntary Provision of Public Goods? The Turnpike Companies of Early America," *Economic Inquiry*, October 1990, pp. 788-812; Klein, Dan, Majewski, J., and Baer, C., "Economy, Community and the Law: The Turnpike Movement in New York, 1797-1845," *The Journal of Economic History*, March 1993, pp. 106-122; Klein, Dan, Majewski, J., and Baer, C., "From Trunk to Branch: Toll Roads in New York, 1800-1860," *Essays in Economic and Business History*, 1993, pp. 191-209; Klein, Dan and Fielding, G.J., "Private Toll Roads: Learning from the Nineteenth Century," *Transportation Quarterly*, July 1992, pp. 321-341; Klein, Dan and Fielding, G.J., "How to Franchise Highways," *Journal of Transport Economics and Policy*, May 1993, pp. 113-130; Klein, Dan and Fielding, G.J., "High Occupancy/Toll Lanes: Phasing in Congestion Pricing a Lane at a Time," *Policy Study*, No. 170, Reason Foundation, November 1993; Lemennicier, Bertrand, "La Privatisation des rues," *Journal des Economistes et des Etudes Humaines*, Vol. VII, No. 2/3, June-September 1996, pp 363-376; Semmens, John, "Road to Ruin," *The Freeman* (December, 1981); Semmens, John, "The Privatization of Highway Facilities," *Transportation Research Forum*, (November, 1983); Semmens, John, "Highways: Public Problems and Private Solutions," *The Freeman* (March, 1985); Semmens, John, "Intra-urban Road Privatization," *Transportation Research Record* 1107 (1987); Semmens, John, "Using Competition to Break the U.S. Road Monopoly," Heritage Foundation (December 14, 1987); Semmens, John, "Privatization: Saving While Serving the Public," Goldwater Institute (April 25, 1988); Semmens, John, "Taking Over the Roads," *Liberty* (November 1988); Semmens, John, "Why We Need Highway Privatization," Laissez Faire Institute (March 1991); Semmens, John, "Private Highways? They're Cheaper, Better, Fairer," *Phoenix Gazette* (April 3, 1991); Semmens, John, "The Rationale for Toll Roads: You Get What You Pay For" *Phoenix Gazette* (December 16, 1992); Semmens, John, "Highway Privatization: What Are the Benefits for Arizona?," Goldwater Institute (December 1992); Semmens, John, "From Highways to Buy-Ways," *Spectrum* (Fall 1993); Semmens, John, "How to Solve Mandatory Auto Insurance," Goldwater Institute (July 1995); Semmens, John, "Highway Investment Analysis," Arizona Department of Transportation (December 1994); Semmens, John, "Privatize Driver's License, Registration System," *Tribune* (December 25, 1994); Semmens, John, "Privatizing Vehicle Registrations, Driver's Licenses and Auto Insurance," *Transportation Quarterly* (Fall 1995); Semmens, John,

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a catamaran or regular ferry, and/or hinged busses? Transportation should be completely a private matter, with government limited to (at most) upholding the law against criminals, whether foreign or domestic.

Should this given patch of land be used for a golf course, a housing development, a recreational area or a national park? All acreage should be privately owned, and the landlords should make all such decisions.¹³

Milton Friedman is perhaps the most thorough going and determined violator of taxi cab theory of all quasi free enterprise commentators. He is responsible for a large number of policies which are neither defense of governmental status quo, nor, yet, compatible with full free enterprise. For example, he advocates, in addition to school vouchers, a 3% monetary rule instead of the entire elimination of the Federal Reserve System¹⁴. He favors flexible exchange rates between the various fiat national currencies instead of free market money, e.g., gold¹⁵. He champions the negative income tax, eschewing the complete elimination of the welfare system; he has been associated with the withholding tax, an attempt to make an illegitimate tax system more efficient; he favored the volunteer military during the Viet Nam War, as a means of more effectively pursuing this unjustified act of aggression¹⁶.

The radical libertarian perspective enables us to see another panoply of issues in a different light. I refer here to the question of activist courts, legislatures, presidents, states rights, decentralization, subsidiarity, etc.

"Selling the Roads: Privatizing Transportation Systems," *Liberty* (1996); Semmens, John, "Goodbye, DMV," *Liberty* (January 1996).

¹³ The only exception would be for the limited government libertarian, and for land needed to accommodate courts, armies and police.

¹⁴ Friedman, Milton, *Studies in the Quantity Theory of Money*, Chicago: University of Chicago Press, 1956; Friedman, Milton, *A Program for Monetary Stability*, New York, Fordham University Press, 1960; Friedman, Milton, *The Optimum Quantity of Money, and Other Essays*, Chicago, Aldine Pub. Co., 1969; Friedman, Milton and Anna J. Schwartz., *Monetary Trends in the United States and the United Kingdom, Their Relation to Income, Prices, and Interest Rates, 1867-1975*, Chicago: University of Chicago Press, 1982; Friedman, Milton, *Money and Economic Development*, New York, Praeger, 1973; Friedman, Milton, *Money Mischief: Episodes in Monetary History*, New York: Harcourt Brace Jovanovich, 1992.

¹⁵ For a critique, see Block, Walter, "The Gold Standard: A Critique of Friedman, Mundell, Hayek, Greenspan," *Managerial Finance*, Vol. 25, No. 5, 1999, pp. 15-33;

¹⁶ Friedman, Milton, and Friedman, Rose D., *Two Lucky People*, Chicago: University of Chicago Press, 1998; Friedman, Milton, *There's No Such Thing as a Free Lunch*, LaSalle, Ill.: Open Court, 1974; Friedman, Milton, *Tax Limitation, Inflation and the Role of Government*, Dallas, Tex.: The Fisher Institute, 1978; Friedman, Milton, Friedman, Rose, *Free to choose: a personal statement*, New York: Harcourt Brace Jovanovich, 1980; Friedman, Milton, *Capitalism and Freedom*, with the assistance of Rose D. Friedman; Chicago: University of Chicago Press, 1982; Friedman, Milton & Rose Friedman. *Tyranny of the Status Quo*, San Diego: Harcourt Brace Jovanovich, 1984

Remember, we are talking about criminal *gangs*. Surely, the only relevant issue for libertarians is to reduce their depredations by the greatest degree possible, and to undermine their much-vaunted authority. It matters not one whit, then, which *level* of this criminal conspiracy undertakes which act; the only desiderata is to *reduce* statism to the greatest degree possible. Or, rather, it only matters if there is a systematic causal relation, say, between greater decentralization and more freedom. But in any given case, if greater centralization is coupled with more freedom, then it is incumbent upon us to *favor* the policy.

For example, how do we stand on a president withholding funds from a city that practices rent control? This would undoubtedly tend to centralize power.

However, rent control is undeniably a blatant evil. Therefore, we must favor this presidential initiative. We are *not* in the business of accepting a lesser evil, now (e.g., rent control) so as to obviate a later and greater abomination (whatever it is that greater presidential power and centralization will lead to). Rather, we are in the business of opposing all present wrongdoings, period. In any case, without interpersonal comparisons of utility¹⁷, there is simply no way to make such trade offs in any case¹⁸.

¹⁷ For the importance of subjectivism in economics, see Barnett II, William, "Subjective Cost Revisited," *Review of Austrian Economics*, Vol. 3, 1989b, pp. 137-138; Buchanan, James M. and G.F. Thirlby, *L.S.E. Essays on Cost*, New York: New York University Press, 1981; Buchanan, James M., *Cost and Choice: An Inquiry into Economic Theory*, Chicago: Markham, 1969; Mises, Ludwig von, *Human Action*, Chicago: Regnery, 1949, 1963, 1966; Rothbard, Murray N., *Man, Economy and State*, Auburn AL: Ludwig von Mises Institute, 1993; Rothbard, Murray N., "Toward a Reconstruction of Utility and Welfare Economics," in *The Logic of Action: Method, Money and the Austrian School*, Vol. I, Cheltenham, UK: Edward Elgar, 1997.

¹⁸ For an alternative view on this matter, penned by a leading libertarian theorist, see Hoppe, Hans-Hermann, "Introduction to the Ethics of Liberty by Murray Rothbard," in Rothbard, Murray N., *The Ethics of Liberty*, New York: New York University Press, 1998, pp. xli-xlii, who states: "Libertarians, Rothbard stressed ... must be opposed, as are traditional conservatives ... on principled grounds, to any and all centralization of state power, even and especially if such centralization involves a correct judgment ... It would be anti-libertarian, for instance to appeal to the United Nations to order the breakup of a taxi-monopoly in Houston, or to the U.S. government to order Utah to abolish its state-certification requirement for teachers, because in doing so one would have illegitimately granted these state agencies jurisdiction over property that they plainly do not own..."

In contrast, the thesis of the present paper is that it would be entirely justified to appeal to the very devil himself, in order to get rid of rent control, or to break up Houston's taxi-monopoly, or to rid Utah of its state-certification requirement. The argument is that there are really two gangs at war with one another: the local and the more centralized. Neither has any moral inner track over the other (albeit the local is to be presumptively preferred on practical grounds, but this presumption can be overcome when it is stipulated, as it is in this case between Hoppe and myself, that the central, not the local government, is in the right on any particular case). The motto of libertarianism, at

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On the other hand, we would also favor a municipality withholding funds from the central government, if the goal was to stop the latter from pursuing an unjust foreign war. This of course promotes decentralization vis-a-vis centralization, but this is irrelevant to our main purpose.

What of activist vs. strict constructionist courts? Again, this is not our battle. We are sublimely indifferent to such considerations. For us the only thing of relevance is what the activist and strict constructionist courts *do*. If it is in the direction of libertarian principle, well and good. If not, not.¹⁹

2. The State

There are two possible views of the state with which libertarians have associated themselves. One I shall call the moderate libertarian perspective, the other the radical. In the former case, the government means well. It may be inefficient (it *is* inefficient), and perhaps bumbling, in that it does not benefit from the market test of survival²⁰, but, at least in some meaningful sense, it *is*. That is, it is composed of friends, neighbors, people with whom we went to school, fellow members of the PTA, the Kiwanis Club, etc. It may be prone to err, particularly when it oversteps its proper bounds, but these are sins almost of benevolence, certainly not of viciousness. This moderate view includes both libertarian anarchists²¹ and minarchists.

least the way I see it, is "Justice though the heavens fall!" If the U.N. could have intervened on the justified (e.g., southern side) of the War of Northern Aggression, or in behalf of the Jews in the Nazi concentration camps, or ... my claim is that this would have been entirely compatible with libertarianism. True, the U.N. would have thereby increased its powers, but that is the problem for another day. We do what is right, this minute, and damn the consequences. The alternative is to refuse to do what is justified, at present, because in the future something worse might occur. But suppose that the Martians threatened to blow up the entire earth unless we killed innocent person Smith. The proper libertarian response, I contend, would be to say, "Bomb us and be damned; not a penny, nor a single innocent life, in tribute to evil."

As for "illegitimately grant(ing) these state agencies jurisdiction over property that they plainly do not own," the point is that *neither* level of government has any libertarian legitimacy. This being the case, it is difficult to understand why, purely as a matter of principle, the decision to favor one side or the other can be made on the basis of anything *but* being "in the right on any particular case."

¹⁹ See on this Barnett, Randy E., *The Structure of Liberty: Justice and the Rule of Law*, Oxford: Clarendon Press, 1998; Barnett, Randy E., 1978, "Toward a Theory of Legal Naturalism," *The Journal of Libertarian Studies*, Vol. 2, No. 2, Summer, pp. 97-108; Barnett, Randy, "Pursuing Justice in a Free Society Part One: Power vs. Liberty," *Criminal Justice Ethics*, 4: 50-72, 1985.

²⁰ Hazlitt, Henry, *Economics in One Lesson*, Arlington House Publishers, New York, 1979.

²¹ The only libertarian anarchist who falls into this category is David Friedman. See his

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In the radical world-view, the government is nothing like a doddering old uncle who is well intended but somewhat accident-prone. In sharp contrast, the state is a predatory gang. In earlier days, it attacked peaceful villages, engaged in theft, murder and rapine, and then stole back to its highland hangout. With increasing sophistication, it gave up its hit and run tactics. The next time it attacked the peaceful settlement, it stayed there, taking on the role of the mayor and the town council. The iron fist was still there, but it now became wrapped in the velvet glove of democracy²². And along the way this band of thieves bought out the academic and religious classes, paying them to weave apologetics about its wise and benevolent rule.

This radical view also includes both libertarian anarchists and minarchists, as Chart 1 makes clear. That is, there are radical anarchists (A), moderate anarchists (B), radical minarchists (C), and moderate minarchists (D). The first group (A) would eliminate the government entirely, and interprets it as a predatory gang of criminals. The second group (B) also wishes a total end to the state, but does not see it as a group of crime lords; rather, as bumbling. The third group (C) wants government to be limited to armies, police and courts, and perceives government as a veritable "Murder Inc." when it oversteps these bounds. The fourth group (D) calls for state limitation to the same three functions, but does not at all interpret it as a criminal gang when it exceeds these roles.

Chart 1

	Libertarians	
	Radical	Moderate
Anarchists	A	B
Minarchists	C	D

The usual debate, within libertarian circles, is between A and B on the one hand and C and D on the other. For purposes of the present paper, however, the disagreement is not so much AB vs CD, as it is AC vs BD.

In the BD perspective, the correct attitude toward the state is to rein it in toward its proper role (nothing in the case of B, something limited for D). In sharp contrast, the attitude of AC is pretty much hatred and seething indignation. After all, not only does the state engage in theft on an enormous scale and in

Friedman, David, *The Machinery of Freedom: Guide to a Radical Capitalism*, La Salle, IL: Open Court, 2nd ed., 1989; see also Friedman, David, "How to Think About Pollution; or, Why Ronald Coase Deserved the Nobel Prize," *Liberty*, Vol. 5 No. 3, January 1992, pp. 55-59.

²² For a libertarian critique of this particular curious institution, see Hoppe, Hans-Hermann, *Democracy - The God That Failed: The Economics and Politics of Monarchy, Democracy, and Natural Order*, Rutgers University, N.J.: Transaction Publishers, 2001

massive murder²³, but it has the effrontery to pose as a benevolent institution²⁴.

A word about the seemingly anomalous groups, B and C. One might expect B to take a radical position; after all, they are anarchists. But anarchism, for purposes of this paper applies only to the proper role for government envisioned. It has nothing to do with the perspective from which one views those who violate this limit. Thus, it is a logically consistent position to push for the end of the government, with no wish, whatsoever, for retaliation against the perpetrators. Similarly C. Here, since there is no call for a total end of the government, for its complete elimination, one might think that a desire for revenge would be entirely lacking. But this need not be so; to think that it is, is to confuse what a philosophical perspective considers the proper scope of government with how it views the standing of those guilty of exceeding this scope.

4. Libertarian punishment theory

Suppose it was not the U.S. that had liberated the victims of Nazi Germany, but rather Libertariana, an entity based on libertarian principles²⁵. How would the trials have differed, and in what way might they have been similar? The short answer is that there would have been broad congruencies between the two, but the latter would have been far more extensive. After all, libertarianism consists of a theory of just initial ownership, the proper transfer of property, and thus rectification for its improper transfer, e.g., the return of stolen property. However, this applies not only to physical property, but to human life as well. Say what you will of the Nazis, it cannot be denied that they violated human life on a massive scale, and were guilty of theft of a gargantuan dimension as well. If anyone deserved the hand of justice raised against them, it was they.

²³ Conquest, Robert (1990) *The Great Terror*, Edmonton, Alberta: Edmonton University Press; Conquest, Robert (1986), *The Harvest of Sorrow*, N.Y.: Oxford University Press; Courtois, Stephane, Nicolas Werth, Jean-Louis Panne, Andrzej Paczkowski, Karel Bartosek and Jean Louis Margolin, *The Black Book of Communism: Crimes, Terror, Repression*, trans. from French by Murphy, Jonathan and Mark Kramer, Cambridge, MA: Harvard University Press, 1999; Rummel, R. J., *Death By Government*, New Brunswick, NJ: Transaction, 1994; Rummel, R. J., *Democide: Nazi Genocide and Mass Murder*. Rutgers, New Jersey: Transaction Publishers, 1992; Rummel, R. J., *Statistics on Democide*. Center on National Security and Law, University of Virginia, 1997; Rummel, R. J., *Death By Government*, New Brunswick, NJ: Transaction, 1996.

²⁴ Let it be repeated here: we are now discussing governments such as Nazi Germany, the now happily defunct U.S.S.R., North Korea and Cuba. Nothing herein should be interpreted as applying to the U.S., Canada, Europe, Japan, Australia or any other country I might ever be resident of, or even visit.

²⁵ For the radical minarchists, this would be a libertarian government; for the radical anarchists, this would be a private group of cooperating people.

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Another similarity is that there definitely would have been a Nuremberg type trial had Libertarianism conquered the Nazis, and been placed in a position of trying out justice to them. There is no barrier in this philosophy to ex post facto law. The axiom proscribing aggression against innocent people is the absolute bedrock of civilization. All of those who violate it do so at their peril, in this view, whether they acknowledge this or not, whether they themselves enact legislation incompatible with this principle or not.

In order to probe the extent of libertarian concerns in this venue, it is necessary to first discuss the punishment theory of this philosophy. In encapsulated form, it calls for two teeth for a tooth, plus costs of capture and a premium for scaring. How does this work?

Suppose I steal a TV set from you. Surely, the first thing that should occur when I am captured is that I be forced to return to you my ill-gotten gains. So, based on the first of two "teeth," I must return this appliance to you. But this is hardly enough. Merely returning the TV to you its rightful owner is certainly no punishment to me the criminal. All I have been forced to do is not give up my own TV to you, but to return *yours* to you. Thus enters the second tooth: what I did (tried to do) to you should instead be done to me. I took your TV set; therefore, as punishment, you should be able to get mine (or some monetary equivalent). This is the second tooth.²⁶

But this is only the beginning of the attempt to turn the future back into the sort of place it would have been had the theft not occurred in the first place, the ultimate (and of course impossible) goal of libertarian justice. For so far we have ignored the costs of searching for the criminal, capturing him, trying him, etc. These, too, must be taken into account, apart from the rare exception where the guilt struck criminal turns himself in to the authorities immediately, with a full confession. But even here there is the fourth dimension of crime to be considered. For when I entered your home, in order to steal your TV, you didn't know *what* I was capable of, or intended. In short, I scared you half to death, in addition to making off with your valuable property. Where is the compensation, the "making whole" for that bit of wickedness? In contrast, when I am punished under the rule of law²⁷, there is no such risk. That is, punishment²⁸ is clear and

²⁶ It should be clear why the libertarian punishment theory calls for exactly two teeth, not 1.9 nor 2.1. The first one comes from returning stolen property, the second from doing to the thief what he tried to do to the victim.

²⁷ See Hayek, Friedrich A., *The Constitution of Liberty*, Henry Regnery Company, Chicago, 1960; see also Hamowy, Ronald, "Law in the liberal society: F.A. Hayek's Constitution of Liberty," *The Journal of Libertarian Studies*, Vol. 2, No. 4, Winter 1978, pp. 287-297.

²⁸ This is apart from that "little" matter of the authorities being either so incompetent, vicious and/or both so as to allow the inmates to conduct homosexual rape, beatings and murders against one another.

foreseeable.

In order to make good this imbalance, the libertarian code of justice requires that the perpetrator pay for the fear he imposed upon his victim, in addition to the more objective costs. To this end, all criminals shall be forced to play a game of Russian roulette, with the number of bullets and the total number of chambers to be determined by the severity threat he imposed on his victim. For example, for a relatively minor crime of TV theft, when the owner was not home and the criminal unarmed, with no record of past violence, there might be 1,000 chambers and only one bullet. But, with the victim at home, who is tied up, an armed criminal, a violent background, etc. -- as the risk increases, so does the punishment -- the number of bullets increases and the number of chambers decreases.

So far, we have not mentioned the criterion of crime prevention. That is because the libertarian is not a utilitarian theory of punishment, designed to limit *future* crime. Rather, it is totally backward looking, to the past crime itself. It asks only what is the requirement of justice for that particular rights violation. However, as can be seen, the freedom philosophy implies a far more Draconian approach to crime than most. Crime prevention thus enters the libertarian equation not directly but indirectly. We do not ratchet up the penalties until the optimal rate of crime is reached.²⁹ Rather, we allow the "punishment to fit the crime," and consider such benefits as retardation of future criminality to be much beside the point of justice. As long as justice is done, the future will likely take care of itself.

To whom is the penalty for crime owed? It is to the *victim*, not to "society" or to the state, or to the office of the attorney general, or to any other such entity. As such, the victim is free to forgive the perpetrator for the crime³⁰, or to charge a mutually agreeable monetary fee in lieu of imposing any part of it. For example, the criminal may escape having to play Russian roulette by paying off the victim.³¹

What of the crime of murder? Although this may be more complicated from the libertarian point of view, the very same model, of theft, is employed. What, then, did the murderer steal? Why, he stole a life, of course. Applying the two teeth for a tooth model, then, we arrive at the conclusion that the first tooth

²⁹ For this utilitarian approach, see any mainstream economic treatment of "optimal" crime rates.

³⁰ A pacifist might adopt this as a general policy.

³¹ If there is any fear on the part of victims against further retaliation from the criminal or his friends if the full penalty is imposed, the victim can sign a prior agreement with the private defense agency giving up this right; a limited government police force might be able to offer this service, since it would not be so busy doing everything else under the sun.

would be to transfer the life the murderer stole from the victim, back from him and into the body of the dead victim.

At this point, no doubt, the detractor will criticize that there is simply no way to transfer a life from the body of the live murderer into that of the dead victim. There are several ways to deal with this spurious objection. First, we are here staking out the requirements of justice. The mere state of reality at any given epoch is of no moment whatsoever; justice is timeless. Second, we can posit a machine that can do just that task³². Perhaps, in 10,000 or 100,000 or 1,000,000 years science will arrive at this point. Then, for the concrete bound, there will be a way of actually attaining full justice, as opposed to merely sketching out its contours, as at present. However, this machine, whether or not it ever comes into being, can already play an important role as heuristic device. For with its aid we can now see that the life of the murderer is forfeit. Plain and simple, he took a life; he owes a life. Whether or not this can be transferred to the dead body of the victim, the murderer is no longer the appropriate owner of his own life. If it cannot be transferred to the dead victim, at least it can be given over to his heirs, to do with as they wish. Perhaps they can enslave him for life. Or hang him publicly, charging admission for the spectacle. Whatever.

Of course, with this machine, the case is more direct, at least for the first tooth. However, we need the further assumption that man is like the cat in having nine lives in order for the full panoply of libertarian justice to come into its own. Then, we take one life from the murderer in order to return it to the dead victim, as before. We take a second life from him in order that what he did to another be done to him.³³ We still charge him for the costs of capture, we may conceivably worth a third life, and we certainly force him to play Russian roulette with as many bullets as there are chambers, which yields, for sure, a fourth life. Call it 3 and a half for one; no matter the exact number, it is a reasonably steep price.

This analysis also sheds light on so called mitigating circumstances such as accident, mental handicap, extreme youth of the perpetrator. We can now more clearly see that these are the merest of excuses to evade justice. The difficulty is that the focus is placed almost entirely on the killer. What of the victim? With the latter in the picture (whether through courtesy of the life transfer machine or of the libertarian concern with the return of stolen property), we can see not one but *two* people; not only the person who killed by "reason of insanity"³⁴ or drunkenness, or accident, but also the *victim*. Given that there is

³² See Nozick, 1974, for arguments based on imaginary machines.

³³ This also addresses the issue of whether mass murderers would pay a greater debt than killers of a single innocent victim: yes, they would. They owe a life for *each* of the ones they shed. Too bad cat-humans have but nine lives to give up for this purpose.

³⁴ For an antidote to this sort of thinking, see Szasz, Thomas Stephen, *The Myth of Mental Illness: Foundations of a Theory of Personal Conduct*, New York, Hoeber-Harper [1961]; Szasz, Thomas Stephen, *Law, Liberty, and Psychiatry: An Inquiry into the Social Uses of*

only one life available, but *two* not merely *one* candidates for it, which of them is the *more* deserving of it? Is it the killer, who is at least somewhat responsible, or the victim, who is *totally* innocent of any wrong doing whatsoever? To ask this is to answer it. Consider, even, the two-month old baby who somehow finds a pistol in his crib, pulls the trigger, and kills a passerby³⁵. Who should keep the life now under the control of the baby: the infant, or the victim? It is not a matter of blame³⁶. The baby, certainly, is not blameworthy; but he *did* kill someone³⁷.

5. Nuremberg trials, libertarian style

With this as a background, we are now ready to launch into a consideration of our forthcoming libertarian Nuremberg Trials. It will be remembered that we are concerned with far more than murder or outright theft. *Every* violation of the libertarian code is potential grist for our mill.

a. All are guilty

Suppose that Nazi Germany had a law against the manufacture, sale, transport and use of alcohol. This is clearly incompatible with the libertarian legal code, in that beer, wine and liquor are not invasive weapons. Their use, by adults, is certainly a non-aggressive act. Anyone who used violence against those involved in this industry, whether on the supply or demand side, is thus guilty of criminal behavior. At least as a first approximation, *every* German involved in the promulgation, adjudication, promotion and enforcement of this unjust law is thus guilty of a violation of libertarian principle, and should be treated as a thief, kidnapper, or worse.

Or consider a Nazi German minimum wage law. Surely, it is the right of people to work at whatever wages to which they can mutually agree. Perpetrating a law prohibiting this, such as one mandating wage minima, is thus a criminal act. All those responsible for enacting it, enforcing it, incarcerating violators of it, etc., would therefore have to be considered law-breakers by libertarians.

Another case. It is impermissible for the government to own, manage, run, develop, or have anything to do with roads, streets or highways. For neither

Mental Health Practices. New York, Macmillan [1963].

³⁵ I owe this example to Matthew Block.

³⁶ Intent is not entirely absent from libertarian criminal law. Its presence implies two teeth for a tooth, plus additions; its absence, e.g., accident, calls forth only one tooth, compensation. Also, intent is crucial in distinguishing between a guilty accomplice to a crime, and someone who innocently sells the criminal something necessary to commit his nefarious deed, e.g., food or clothing. I owe this latter point to Michael R. Edelstein.

³⁷ In a real case of this sort, presumably the person who would have to give up his life would be the one who put the gun in the crib, or the guardian who failed to ensure that such an occurrence did not take place.

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minarchists nor anarchist libertarians would the state be involved in this vehicular industry. One possibility, then, is that *any* motorist who uses a highway, along with all those responsible for the improper nationalization of this industry, would be considered guilty of a crime by the libertarian Nuremberg judges. But there are many other facilities typically organized by government which are equally improper under the libertarian legal code: libraries, schools, museums, Post Offices, parks, welfare, social security, socialized medicine, anti trust, rent control, etc.

The problem with arresting and incarcerating all those who have had anything to do with these laws or institutions (and there are many many more) is that virtually the entire Nazi populace would be then found guilty of criminal behavior. The only exceptions might be children, or those long ensconced in mental institutions. But surely there is something profoundly wrong with labeling as criminal virtually an entire society. This is all too similar to the leftist complaint that "we are all guilty" for the sins of modernity. If so, there are some who are much more responsible for social failings than others, so much so that it is only the former who should be considered guilty, and the latter as victims. This is, further, all too similar to the invalid idea that "we are all" the state, or that "Government Are Us." Not only have we already rejected this notion as not compatible with radical libertarianism, it is to be further (rejected) in that if we are *all* guilty, then, none of us really is.